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No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1969

RONALD AZRIE MAYERSOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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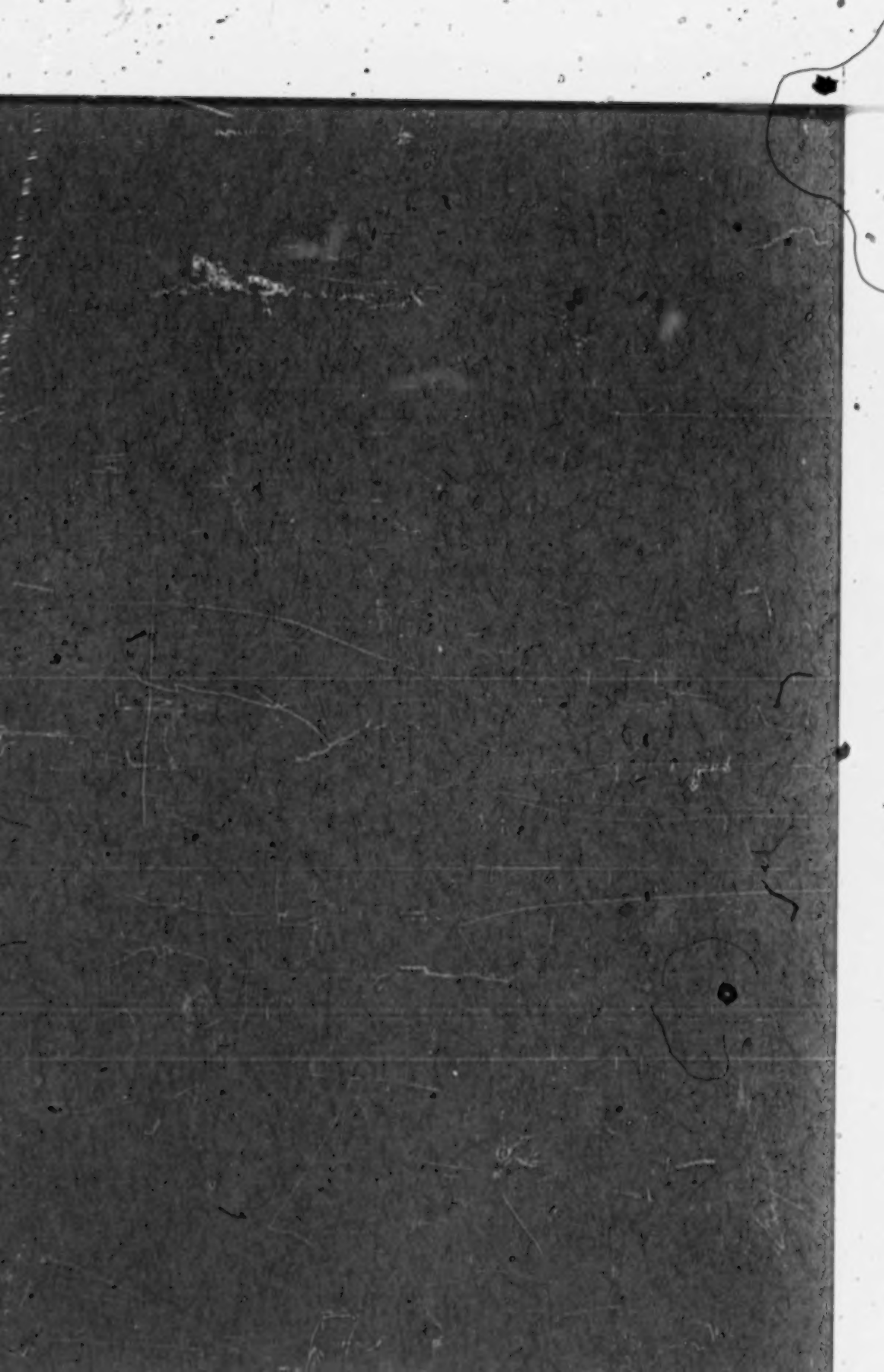

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 848

RONALD AMES MATERSOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 413 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1969. A petition for rehearing was denied on September 15, 1969. On October 6, 1969, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to November 14, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

374-346—70

QUESTION PRESENTED

Whether government counsel's question on cross-examination to petitioner (who had previously pleaded guilty and then withdrawn his plea) whether he had made a certain statement to an individual who was in fact a probation officer, but was not identified as such to the jury, constituted prejudicial error.

STATEMENT

Petitioner was convicted, after a jury trial in the United States District Court for the Eastern District of New York, on two counts charging, respectively, evasion of military service by a fraudulent claim of membership in a reserve unit and the making of a false statement bearing upon his classification for military service, both in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment.

The government's evidence showed that petitioner had paid $2,500 to one Paul Miller, in return for which Miller arranged for a fraudulent Form DD 44 to be submitted to petitioner's local board indicating that petitioner was a member of and serving satisfactorily in a reserve unit. As a result of the submission of that form, petitioner's notice of induction, which had previously been issued, was cancelled. Miller testified that petitioner was aware that the form would be submitted containing false and fraudulent information and that he would not actually be enrolled in a reserve unit. Petitioner testified that, to the contrary, he believed that he was purchasing no more than Miller's influence to obtain entry for him

into the reserves after he had been unable to obtain entry by his own efforts.

Petitioner had previously pleaded guilty to the second count of the indictment, and thereafter had withdrawn his plea. Prior to withdrawal of the plea, he had been interviewed by a probation officer named Mundy. On cross-examination, petitioner was asked when he had given certain information to Miller, and replied that it could have been in September (Tr. 949). When asked if it could have been in November, he replied in the negative (*ibid.*).[1] He was then asked if he had told Mundy that he had given the information to Miller in November rather than September, and replied: "Then I was mistaken because——" (Tr. 950). After further cross-examination, during which he denied that he had approached Miller after receiving his induction notice, he was asked: "You did tell Mr. Mundy you went to Miller in November?" (Tr. 954). After first replying that it would have been impossible (*ibid.*), he said: "I really don't remember, sir. If you say I did, I did" (Tr. 955).

Mundy was never identified to the jury as a probation officer. After the close of testimony and prior to

[1] The inquiry was relevant to resolving a conflict in testimony between him and Miller. He could not have lawfully altered his draft status by entering a reserve unit after receiving his notice of induction (which was mailed to him on October 15), and hence, it could be inferred, if he supplied Miller with pertinent information after receiving the notice, that he knew that Miller's efforts on his behalf would be fraudulent. The fraudulent Form DD 44 was in fact received by petitioner's local board on October 21.

summations, petitioner's counsel asked that Mundy's position be identified for the record (Tr. 1048). He requested that the fact that petitioner had originally pleaded guilty be kept from the jury (Tr. 1049), and made only the unspecific suggestion that the court "could make any sort of comment that he thinks is fit" (Tr. 1049–1050). The question of whether government counsel had seen and made improper use of the probation report was never raised. The court ruled that there was no way in which Mundy's identity could properly be brought to the attention of the jury, and that, except for informing the jury, his identity was now a matter of record (Tr. 1049–1050).

The court of appeals ruled that the question should not have been asked, but was in context harmless since the jury never learned that Mundy was a probation officer (Pet. App. 5a).

ARGUMENT

The court below was justified in concluding that, on the particular facts of this case, the questioning of petitioner as to what he had told Mundy did not constitute reversible error.

The question itself was but a minor part of a lengthy cross-examination. Moreover, petitioner's answer to the question was equivocal; the question did not in fact draw from him an admission damaging to his defense. The jury was not informed that Mundy was a probation officer, and hence had no way of knowing from the question that petitioner had previously pleaded guilty.

Petitioner endeavors to give general significance to the instant case by making the assumption from government counsel's questioning (1) that he had seen the presentence report and (2) that it is a general practice in that district for government counsel to see such reports prior to trial when guilty pleas are withdrawn. Petitioner asserts that the government "has never denied, either in the trial court or in the Court of Appeals, that it had improper access to the presentence report" (Pet. 14). As noted in the Statement, the question was never raised in the trial court. The government attorney who tried the case left office before the appeal was briefed; the attorney who prepared the brief and argued the appeal on the government's behalf consulted only the record and not the attorney who had tried the case.

In view of the assumptions made by petitioner's counsel, we have investigated the matter in some detail. We are informed that the policy obtaining in the district here involved is that probation reports are not made available to the government even when they are given to defendants, despite the provisions of Rule 32(c)(2), F.R. Crim. P., in this regard. The former Assistant United States Attorney who tried the case informs us that he in fact did not see the report relating to petitioner. He said that his questioning was based instead on a calculated guess that petitioner might have made such a statement to the probation officer, since as a matter of policy probation officers seek to obtain admissions of the details

of their guilt from defendants who plead guilty.[2] While we believe that, even so, such questions should not have been asked, the issue has none of the general implications with which petitioner seeks to endow it. The question is simply one of harmless error on the particular facts. That question was properly resolved against petitioner by the courts below, and further review is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Assistant Attorney General.

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JANUARY 1970.

[2] The former government attorney acknowledged that he had made inquiries of probation officers as to admissions of guilt made by other defendants who had pleaded guilty. Petitioner was one of a large number of defendants who were indicted on the basis of their transactions with Miller. Many pleaded guilty, but some, like petitioner, contested their guilt, either initially or eventually. All of the latter asserted that they believed that Miller was actually going to obtain entry for them into a reserve unit. Since the government's case in all instances depended primarily upon the testimony of Miller, the former government attorney wanted to assure himself that he was not obtaining convictions on the basis of perjured testimony. He therefore inquired of probation officers in a number of instances whether defendants who pleaded guilty acknowledged their awareness that fraudulent information had been submitted to their local boards by Miller on their behalf.

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